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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963.

No. 463

LYDON WEBBER, *et al.*,

*Petitioners,*

*against*

TURNER & BLANCHARD, INC.,

*Respondents,*

*and*

SS. *EMILIA* and A. H. BULL STEAMSHIP CO.

## BRIEF OF CALTEX (INDIA) LIMITED IN OPPOSITION TO PETITON FOR CERTIORARI

CLEMENT C. RINEHART,
*Counsel for Caltex (India) Limited,*
120 Broadway,
New York 5, N. Y.

Pandick Press, Inc., 22 Thames St., New York, N. Y. 10006. U. S. A.

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## BRIEF OF CALTEX (INDIA) LIMITED IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is on behalf of CALTEX (INDIA) LIMITED (hereinafter called "Caltex"), an appellee in the Court of Appeals and one of more than 200 consignees of goods which were shipped upon the SS. *Emilia*, as a common carrier, for delivery at various foreign ports. The goods were eventually discharged from the vessel at New York by the United States Marshal pursuant to the order of sale questioned by the petitioners.

### QUESTIONS PRESENTED

The petition for certiorari* erroneously represents that the decisions below present questions as to distribution of

* This brief also opposes the petition of Maritime Food Corporation (October Term, 1963, No. 499) which merely asks certiorari for "the reasons set forth" in the petition of Lydon Webber, *et al.* (No. 463).

a fund among maritime lienors having conflicting claims. In fact, no fund or proceeding for distribution of a fund existed when the District Court made and the Court of Appeals affirmed the order which is the subject of the petition. That order directed the United States Marshal to sell the SS. *Emilia pendente lite.* (App.* D)

The only questions presented in respect of that order are:

(1) Whether the District Court exceeded its discretionary power to determine the terms of sale of a vessel by including in such terms an order to the United States Marshal to discharge, prior to the sale, cargo of third parties then aboard the vessel and authorized the costs of discharge to be repaid out of the proceeds of sale; and

(2) Whether this Court should exercise its discretionary power to review the order of sale at the instance of petitioners who never did apply for a stay of any kind before the Marshal had discharged the cargo and had sold the vessel in reliance upon the validity of the order of the District Court affirmed by the Court of Appeals?

## Statement of the Case

The only order presented for review is the order, dated May 21, 1963, for the sale of the SS. *Emilia pendente lite,* (App. D). It was made upon a motion by Turner & Blanchard, Inc., libelants in an admiralty suit brought by them as operators of the wharf where the *Emilia* had loaded and was still lying. The suit was against the SS. *Emilia in rem* and against her insolvent owner, A. H. Bull Steamship Co., *in personam.* (App. B) More than 25 other suits were also pending against the vessel. (App. pp. 10a-12a)

* "App." refers to the appendix to the brief of petitioners Lydon Webber, *et al.*

Petitioners object only to those provisions of the order of sale which directed the Marshal to sell the vessel "free of cargo" and authorized the Marshal's costs for unloading to be deemed an "expense of the sale" and repaid "out of the proceeds of sale" (App. p. 15-a).

The necessity for the sale of the *Emilia* was unquestionable and is not challenged. The vessel and cargo (all of which belonged to third parties) were deteriorating and the expense of keeping the vessel in custody was wholly disproportionate to her value.

Discharge of the cargo prior to the sale was manifestly necessary because the Marshal had failed to obtain any bid for the vessel when he had offered her for sale (pursuant to a prior order of the District Court) without removal of the cargo. (App. pps. 13-a; 21-a)

In order to effect the discharge, it was also necessary to authorize the Marshal to pay for such discharge out of the proceeds of sale because no other means of payment existed. No person or persons other than the insolvent owner had any legal obligation to provide funds for the discharge nor could anyone be compelled to provide such funds.

After the discharge had been effected, the Marshal delivered the goods of Caltex unconditionally to its representatives at New York who have forwarded it to India, its original destination. No doubt, a like situation exists as to the shipments of other parties.

The Marshal sold the SS. *Emilia* on July 30, 1963, for $250,000 and on August 7, 1963 the District Court directed the Clerk to pay the Marshal the sum of $192,176.62 "out of the proceeds of the sale" to cover the Marshal's fees, costs and expenses, including the cost of discharge. (App. F)

The net proceeds of the sale, amounting to $57,823.38, constitute a fund which will be available for distribution to those persons who may be able in the future to establish valid claims against the fund.

## Argument

From the foregoing statement, the premature nature of the questions suggested and the arguments made in the petition for certiorari and supporting brief are obvious. They relate only to questions as to the distribution of the fund which can only arise when the pertinent facts have been established in appropriate future proceedings.

Review of the District Court's order of sale should be denied by this Court for the following reasons, among others:

(1) The District Court's order for the sale of the SS. *Emilia* was an exercise of the Court's discretionary power of sale under Rules 11, 12 and 40 of the Rules of Practice in Admiralty promulgated by this Court (245 U. S. App.) and having the force of statutory law (28 U. S. C. §§2071-2073). Discretionary power of the Court to fix the terms of sale was expressly included by the Rules and was also implicit in the power to sell.

Both lower courts held that, under the factual situation then existing, the District Court validly exercised its discretionary power in ordering the Marshal to discharge the cargo prior to the sale and to reimburse himself from the proceeds of sale for the cost of discharge. In fact, those provisions were essential to the accomplishment of of the Court's primary power and duty to sell the *Emilia*.

This Court will not review discretionary orders whose propriety is established by concurring decisions of the lower courts on questions of fact. *Just* v. *Chambers*, 312 U. S. 383.

Furthermore, this Court's decision in *The Poznan*, 1927, 274 U. S. 117, was controlling. The expense of unloading the *Emilia*'s cargo and putting it on a wharf to make it available to its owners was indistinguishable, in principle, from the wharfage expense involved in the *Poznan* case. That wharfage expense was incurred for exactly the same purpose and was held by this Court to be payable out of the proceeds of sale before any distribution of the fund created by the sale. The wharfage expense was considered to be an incident of the administration of property or a fund in the custody of the Court for the benefit of suitors and was, therefore, chargeable to the fund before its distribution.

(2) An additional compelling reason exists why this Court should decline to exercise its discretionary power to review the decisions below. In view of the petitioners' inexcusable failure to apply for a stay of the discharge and sale before they had occurred and, further, because the Marshal and other parties cannot be restored to the position they had prior to having acted in reliance upon the order of the District Court, this Court should not permit that order to be disturbed.

## Conclusion

The petition for certiorari should be dismissed.

October, 1963.

Respectfully submitted,

Clement C. Rinehart,
Counsel for Caltex (India) Limited,
120 Broadway,
New York 5, New York.